BRIEF ON LEGAL RESTRICTIONS ON IMPERIAL IRRIGATION DISTRICT'S DIVERSION AND USE OF COLORADO RIVER WATER BY

Coachella Valley Water District submits this brief as part of its written submission of information, comments and suggestions which relate to the recommendations and determinations authorized by 43 C.F.R. Part 417 with respect to Imperial Irrigation District's water order order regarding its use of Colorado River water for calendar year 2003. This brief summarizes the legal constraints on the diversion and use of Colorado River water by Imperial Irrigation District.

A. FEDERAL STATUTORY REQUIREMENTS OF BENEFICIAL USE

Beneficial Use is a fundamental restraint on all users of water under federal reclamation projects, limiting both the purposes for which water may be diverted and applied and the amount. The Boulder Canyon Project Act adopts this requirement by provisions that incorporate the Reclamation Act of 1902 and provisions that ratify and confirm the Colorado River Compact, and subordinate all project users and operations to the Colorado River Compact. The Secretary has given further effect to this requirement by the regulations promulgated in 43 C.F.R. Part 417.

1. Reclamation Act of 1902

The proviso of Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 372) states:

> "The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the measure, and the limit of the right."

The proviso is a specific Congressional directive which acts as a restraint upon the Secretary of the Interior's administration of reclamation projects. (*California v. United States* (1978) 438 U.S. 645, 678, n. 31; *Fox v. Ickes* (D.C. Cir. 1943) 137 F.2d 30, 33.) This limitation applies independent of the provisions of any contract with the Secretary. (*United States v. Alpine Land & Reservoir Co.* (1983) 9th Cir. 697 F.2d 851, 855; *Fox v. Ickes*, *supra*, 137 F.2d at 33.)

This proviso applies to contractors under the Boulder Canyon Project Act because Section 14 of the Boulder Canyon Project Act (43 U.S.C. § 617m) expressly requires the Secretary to be governed by the Reclamation law in operating the project and Section 12 of the

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Boulder Canyon Project Act (43 U.S.C. § 617k) in turn defines Reclamation law to include the Reclamation Act of 1902.

In construing the proviso, the Ninth Circuit has held that:

> "There are two qualifications to what might be termed the general rule that water is beneficially used (in an accepted type of use such as irrigation) when it is usefully employed by the appropriator. First, the use cannot include any element of 'waste' which among other things, precludes unreasonable transmission loss and use of cost-ineffective methods. [citations omitted.] Second, and often overlapping, the use cannot be 'unreasonable' considering alternative uses of the water."

(*Alpine Land & Reservoir Co. (1983), supra,* 697 F.2d at 854.)

The Ninth Circuit further held that:

> "It is settled that beneficial use expresses a dynamic concept, which is a 'variable according to conditions,' *Farmers Highline Canal,* 129 Colo. at 585, 272 P.2d at 534, and therefore over time, *see United States v. Fallbrook Public Utility District,* (9th Cir. 1965); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* 3 Cal.2d 489, 567, 45 P.2d 972, 1007 (1935); *Basin Electric Power Cooperative v. State Board of Control,* 578 P.2d 557, 563 (Wyo. 1978). . . . The district court, in the absence of earlier determination of beneficial use, was correct to find beneficial use as of the present time, as shown by the best available current information."

(*Alpine Land & Reservoir Co. (1983), supra,* 697 F.2d at 855.)

In the *Tulare Irrigation District* case, on the point cited with approval by the Ninth Circuit, the California Supreme Court held:

> "Preliminarily, it should be stated that, whatever quantity an appropriator has actually diverted in the past, he gains no right thereto unless such water is actually put to a reasonable beneficial use. (26 Cal. Jur. 93, sec. 286.) What is a beneficial use, of course depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a reasonable beneficial use at one time may, because of changed conditions, become a waste of water at a later time."

(*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489, 567.)

2. Boulder Canyon Project Act Incorporation of Colorado River Compact

Article III(a) of the Colorado River Compact states:

> "There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive *beneficial consumptive use* of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."

(Emphasis added.)

Article III(e) of the Colorado River Compact States:

> "The State of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses."

The provisions of the Colorado River Compact govern operations of the Boulder Canyon Project under Sections 1, 8 and 13 of the Boulder Canyon Project Act. (43U.S.C. §§ 617, 617g and 617*l*.)

3. Regulatory Process and Relevant Factors for Determination of Beneficial Use

Section 10 of the Reclamation Act of 1902 (43 U.S.C. § 373) states:

> "The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect."

Pursuant to this authority, the regulations of 43 C.F.R. Part 417 have been promulgated and govern

> "[T]he making by the Regional Director of annual determinations of each Contractor's estimated water requirements for the ensuing calendar year to the end that deliveries of Colorado River water to each Contractor will not exceed those reasonably required for beneficial use under the respective Boulder Canyon Project Act contract or other authorization for use of Colorado River water."

(43 C.F.R. §417.2.)

In listing the substantive factors to be considered, 43 C.F.R § 417.3 provides in pertinent part:

"The recommendations and determinations shall, with respect to each Contractor, be based upon but not necessarily limited to such factors as the area to be irrigated, climatic conditions, location, land classifications, the kinds of crops raised, cropping practices, the type of irrigation system in use, the conditions of the water carriage and distribution facilities, record of water orders, and rejections of ordered water, general operating practices, the operating efficiencies and method of irrigation of the water users, amount and rate of return flows to the river, municipal water requirements and the pertinent provisions of the Contractor's Boulder Canyon Project Act water delivery contract."

B. BOULDER CANYON PROJECT ACT CONTRACT REQUIREMENT

A second fundamental legal restraint on Imperial Irrigation District's diversion and use of Colorado River water is the Boulder Canyon Project Act's requirement that all users must have a Section 5 contract with the Secretary. This requirement has two effects. First, it displaces that application of state law in the allocation and distribution of Colorado River water in the Lower Colorado River Basin. Second, as reinforced by the Supreme Court Decree in *Arizona v. California*, it prohibits the Secretary from delivering, and Imperial Irrigation District from diverting and using, Colorado River water for use for purposes not authorized by the IID's Section 5 contract and at places not authorized by that contract.

Section 5 of the Boulder Canyon Project Act (43 USC § 617d) provides in pertinent part:

"That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, ... Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

This provision has been construed by the United States Supreme Court to pre-empt the main of provision of Section 8 of the Reclamation Act of 1902 (which generally requires Reclamation projects to obtain water rights pursuant to state law) and displace the application of state law in the allocation and distribution of Colorado River water in the Lower Basin.

Under the main provision of Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383), the Secretary of the Interior and the Bureau of Reclamation are ordinarily required to

proceed under and observe state law in the acquisition and distribution of water as part of the operations of a reclamation project unless state law is inconsistent with a specific Congressional directive. (*California v. United States* (1978) 438 U.S. 645.) However, the main provision of Section 8 of the Reclamation Act (43 U.S.C. § 383) has no application at all to the operations of the Boulder Canyon Project because the Secretary's Section 5 contract power has been construed by the Supreme Court to be a specific Congressional directive regarding the allocation and distribution of mainstream water of the Colorado River in the Lower Basin that is inconsistent with the main provision of Section 8 and therefore leaves no role for state law to apply. (*Arizona v. California* (1963) 373 U.S. 546, 575-589.)

In *Arizona v. California, supra,* the Court conducted an exhaustive analysis of the legislative history of the Boulder Canyon Project Act and the Court repeatedly and forcefully rejected the various arguments made by the States that state law should control the allocation and distribution of each state's apportionment of Colorado river water:

> "Congress made sure, however, that if the States did not agree on any compact, the objects of the Act would be carried out, for the Secretary would then proceed, by making contracts, to apportion water among the States and to allocate the water among users within each State."

(*Id.*, at 579.)

> "These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made."

(*Id.*, at 580.)

> "In our view, nothing in any of these provisions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover, contrary to the Master's conclusion, we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by the sections [Boulder Canyon Project Act Sections 14 and 18 (43 U.S.C. §§ 617m, 617q)]to follow state law."

(*Id.*, at 585-586.)

> "Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with Ivanhoe, hold that the Secretary must be bound by state law in disposing of water under the Project

Act."
(*Id.*, at 587.)

> "Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. As in Ivanhoe, where the general provision preserving state law was held not to override a specific provision stating the terms for the disposition of the water, here we hold that the general saving language of § 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by § 5. . . . But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place."

(*Id.*, at 587-588.)

> "Today, the United States operates a whole network of useful projects up and down the river, including the Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, Morelos Dam, and the All-American Canal System, and many lesser works. It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the water were effectively used. All this vast, interlocking machinery – a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles – could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse, often conflicting interests of the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the water of the mainstream of the Colorado River."

(*Id.*, at 589.)

The Supreme Court reinforced the primacy of the Secretary's Section 5 contract power in the Decree entered in *Arizona v. California*. In Article II(B)(5) the United States and its officers were expressly enjoined as follows:

"Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute."

(*Arizona v. California* (1964) 376 U.S. 340, 343.)

In Article III of the Decree, the States of Arizona, California and Nevada, and the California contractors, including Imperial Irrigation District, were enjoined:

"(A) From interfering with the management and operation, in conformity with Article II of this decree, of regulatory structures controlled by the United States;

"(B) From interfering with or purporting to authorize the interference with releases and deliveries, in conformity with Article II of this decree, of water controlled by the United States;

"(C) From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective States; provided, however that no party named in this Article and no other user of water in said States shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use;

"(D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this decree."

(*Arizona v. California, supra,* 376 U.S. at 346-347.)

Therefore, under the structure of the Boulder Canyon Project Act, as construed by the Supreme Court and enforced by its Decree, state law has been displaced in favor the provisions of the Secretary's Section 5 contracts regarding the allocation and distribution of Colorado River water and state law may not be relied upon to supercede the limitations of those Section 5 contracts, or to interfere with the Secretary's administration of those contracts and the Boulder Canyon Project Act. Thus state law cannot be asserted as a basis for purporting to expand the purposes for which water may be used, to change the location of use, or to avoid contractual and statutory restrictions on the amount of water that may be used.

C. CONTRACT LIMITATIONS

1. 1932 Section 5 Contract

As noted above, the Secretary's Boulder Canyon Project Act Section 5 contracts define the specific rights of the contractor to the delivery of water. It is therefore important to analyze IID' s 1932 Section 5 contract.

Article 17 of the IID's 1932 Boulder Canyon Project Act Section 5 water delivery contract provides in pertinent part:

> "The United States shall, from storage available in the reservoir created by Hoover Dam, deliver to the District each year at a point in the Colorado River immediately above Imperial Dam, so much water as may be necessary to supply the District a total quantity, including all other waters diverted for use within the District from the Colorado River, in the amounts and with priorities in accordance with the recommendation of the Chief of the Division of Water Resources of the State of California as follows: (Subject to availability thereof for use in California under the Colorado River Compact and the Boulder Canyon Project Act):
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> "The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:
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> "Section 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said district as it now exists and upon lands between said district and the Colorado River, aggregating (within and without said district) a gross area of 104,500 acres, such waters as may be required by said lands.
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> "Sec. 2. A second priority to Yuma project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.
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> "Sec. 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde

Irrigation District for beneficial consumptive use, 3,850,000 acre-feet of water per annum less the beneficial consumptive use under the priorities designated in sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in sections 1, 2, and 3 of this article shall not exceed 3,850,000 acre-feet of water per annum.

"Sec. 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the coastal plain of Southern California, 550,000 acre-feet of water per annum.

"Sec. 5. A fifth priority (a) to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the coastal plain of southern California, 550,000 acre-feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"Sec. 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the 'Lower Palo Verde Mesa,' adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre-feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

"Sec. 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on map No. 23000 of the Department of the Interior, Bureau of Reclamation."

"* * *

"As far a reasonable diligence will permit said water shall be delivered as ordered by the District, and as reasonably required for potable and irrigation purposes within the boundaries of the District in the Imperial and Coachella Valleys in California. . . ."

Article 17 defines the district's rights by several parameters.

Article 17 establishes the time unit by which contract rights are measured as the year, both through the first sentence ("The United States shall ... deliver to the district *each year*....") and the recitation of the Seven Party Agreement ("The total beneficial consumptive use under priorities states in sections 1,2 and 3 of this article shall not exceed 3,850,00 acre-feet of water *per annum*.").

Article 17 implements the amended general regulations governing Section 5 contracts with users in California which established the relative priorities of water users in California pursuant to the Seven Party Agreement.

Article 17 fixes the point of diversion on the river as Imperial Dam.

Article 17 fixes the place of use as "within the boundaries of the District in the Imperial and Coachella Valleys in California". The 1934 Compromise Agreement placed further restrictions on the place of use.

Article 17 limits the beneficial uses for which water may be delivered to "potable and irrigation purposes."

Article 17 reinforces the beneficial use limits imposed by Federal law, as well as those inherent in the priorities of the Seven Party Agreement, by limiting the amount that Imperial Irrigation District may order, and that the Secretary is obligated to deliver, to the amount "reasonably required for potable and irrigation purposes within the boundaries of the District".

2. 1934 Compromise Agreement

Imperial Irrigation District agreed to further limits on its diversion and use of Colorado River water in the 1934 Compromise Agreement between Imperial Irrigation District and Coachella Valley Water District. Under that agreement, Priorities 3(a) and 6(a) of the Seven Party Agreement were the subject of further division between IID and CVWD. Section 15 of the 1934 Compromise Agreement provides in pertinent part:

> "Imperial Irrigation District shall have the prior right for irrigation and potable purposes only, and exclusively for use in the Imperial Service Area, as hereinafter defined, or hereunder modified, to all waters apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in Imperial and Coachella Valleys as provided in the third and sixth priorities set out in the recommendation of the chief of the division of Water Resources of the State of California, as contained in Article 17 of the Imperial Contract. Subject to said prior right of Imperial Irrigation District, Coachella Valley County Water District shall have the next right, for irrigation

and potable purposes only and exclusively for use in the Coachella Service Area, as hereinafter defined, or hereunder modified, to all waters so apportioned to said Imperial Irrigation District and other lands under or that will be served from the All-American Canal in the Imperial and Coachella Valleys, as provided in said third and sixth priorities. The use of water for generation of electric energy shall be, in all respects, secondary and subservient to all requirements of said two districts for irrigation and potable purposes as above limited."

3. 1988 Water Conservation Agreement and 1989 Approval Agreement.

Imperial Irrigation District agreed to further restrict its diversion and use of Colorado River water in the 1988 Water Conservation Agreement, as modified by the 1989 Approval Agreement.

Section 3.1 of the Agreement for the Implementation of a Water Conservation Program and Use of Conserved Water between Imperial Irrigation District and The Metropolitan Water District of Southern California, dated December 22, 1988, provides in pertinent part:

"Subject to the terms and conditions of this Agreement, IID hereby agrees to undertake conservation measures and to make available for use by MWD the water conserved by the Program, subject to the limitations of Sections 3.4 and 3.5. The extent of this IID obligation to make conserved water available is for IID to reduce its annual diversion from the Colorado River below that which it would otherwise have been absent the projects of the Program (in an amount equal to the quantity of water conserved by the Program) to permit the conserved water so made available to be delivered by the Secretary to MWD."

Recital H of the Approval Agreement among Imperial Irrigation District, The Metropolitan Water District of Southern California, Palo Verde Irrigation District and Coachella Valley Water District, dated December 19, 1989, provides:

"The extent of IID's, CVWD's, and PVID's obligation to make Conserved Water available for MWD's use is for IID to reduce its annual Colorado River diversion in an amount equal to the quantity of water conserved and for IID, CVWD and PVID not to use the Conserved Water except as provided in this Approval Agreement and the Conservation Agreement."

The fundamental obligation of Imperial Irrigation District under these agreements is to reduce its annual diversion of Colorado River water in an amount equal to the quantity conserved by the projects and programs implemented pursuant to those agreements.

If the determination of IID's 2003 water order is based upon a methodology that takes into account these projects and programs, then it is not appropriate to make a further adjustment to the water order on the basis of these agreements because IID will have fulfilled its obligation.

If the determination is based upon some other method that does not consider these projects and programs, then the amount derived by such method would thus represent IID's diversions in the absence of these projects and programs. It would therefore be necessary to subtract the volume of conserved water in order for IID to fulfill its obligation.

In either event, the Regional Director's determination should clearly state which is the case and whether adjustment was made.

D. DECREE LIMITATIONS

In addition to the provisions enforcing the Section 5 contract requirement, Article II(B)(1) of the Decree in *Arizona v. California* also imposes on aggregate limit on consumptive use in California during a normal year of 4,400,000 acre-feet. (*Arizona v. California* (1964) 376 U.S. 340, 342.)

The Secretary has determined that 2003 is a normal year in the absence of the execution of the Quantification Settlement Agreement and therefore California is limited this year to an aggregate consumptive use of 4,400,000 acre-feet.

The 1979 Supplemental Decree in *Arizona v. California* fixes Imperial Irrigation District's present perfected right as:

> "27) *The Imperial Irrigation District* in annual quantities not to exceed (i) 2,600,000 acre-feet of diversion from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 424,145 acres and for the satisfaction fo related uses, whichever of (i) or (ii) is less, with a priority date of 1901."

(*Arizona v. California* (1979) 439 U.S. 419, 428.)